

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Bob Fine,

Complainant,

vs.

**ORDER DENYING PETITION
FOR RECONSIDERATION**

Jim Bernstein,

Respondent.

The above-entitled matter came on for a probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge Steve M. Mihalchick on October 18, 2005. The probable cause hearing was held to consider a complaint filed by Bob Fine ("Complainant") on October 12, 2005, alleging violations by Jim Bernstein ("Respondent") of Minn. Stat. §§ 211B.04 and 211B.06.

On October 20, 2005, Administrative Law Judge Mihalchick issued an Order finding probable cause to believe that the Respondent violated Minn. Stat. § 211B.04 by placing a campaign advertisement in a newspaper without a disclaimer, and Minn. Stat. § 211B.06 by preparing and disseminating false campaign material. Judge Mihalchick also dismissed for lack of probable cause two of the Complainant's allegations of false campaign material. Specifically, Administrative Law Judge Mihalchick found no probable cause to believe that two statements in campaign material identified by the Complainant were false statements of fact under Minn. Stat. § 211B.06. On October 24, 2005, the Complainant submitted a petition for reconsideration of Judge Mihalchick's decision dismissing the two allegations of false campaign material. Petitions for reconsideration are governed by Minn. Stat. § 211B.34, subd. 3.

Based on the record herein, and for the reasons stated in the following Memorandum, the Chief Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That Complainant's Petition for Reconsideration is DENIED.
2. That this matter shall go forward as scheduled for an evidentiary hearing to be conducted by a panel of three Administrative Law Judges on October 31, 2005.

Dated: October 27, 2005

/s/ Raymond R. Krause
RAYMOND R. KRAUSE
Chief Administrative Law Judge

MEMORANDUM

Bob Fine and Jim Bernstein are candidates in the November 8, 2005, election for the Minneapolis Park and Recreation Board's District 6 seat. On October 12, 2005, Mr. Fine filed a campaign complaint against Mr. Bernstein alleging that Mr. Bernstein violated Minn. Stat. §§ 211B.04 and 211B.06 in preparing and disseminating various pieces of campaign material. On October 20, 2005, Administrative Law Judge Steve Mihalchick issued an Order finding probable cause to believe that Jim Bernstein violated Minn. Stat. §§ 211B.04 and 211B.06 with respect to eight allegations made in the complaint. The Administrative Law Judge also dismissed for lack of probable cause two allegations of false campaign material. One of the allegations of false campaign material that the ALJ dismissed was based on the following statement that appeared in Respondent's campaign flyer:

"Mr. Fine has become more like a cheerleader for private interests wishing to exploit the Minneapolis Parks system for themselves rather than protecting the parks for all."

The ALJ concluded that this statement is not false campaign material within the meaning of Minn. Stat. § 211B.06, because it is an opinion rather than a false statement of fact. The ALJ cited to the Minnesota Supreme Court's observation in *Kennedy v. Voss*¹ that the statute was "directed against the evil of making false statements of fact and not against criticism of a candidate or unfavorable deductions derived from the candidate's conduct."² The ALJ found that in this case the Respondent is stating his opinion that the Complainant is a cheerleader for private interests.

In his petition for reconsideration, the Complainant argues that there is probable cause to believe that the "cheerleader for private interests" statement is a false statement under Minn. Stat. § 211B.06. The Complainant contends that at the time this statement was disseminated on May 14, 2005, the private interest proposals identified by the Respondent, such as the DeLaSalle High School football field and the Lake Calhoun "sailing village," had not yet come up for a vote before the Park Board. According to the Complainant, "[i]t is not to be a cheerleader on any issue where the campaign statement was made before the vote, such as in the case of DeLaSalle."

The ALJ also concluded in his order that there is no probable cause to believe that the Respondent's statement in a campaign flyer that the Complainant supports voting or did vote "to hire a Superintendent who never applied and was never screened for the job" is false campaign material under Minn. Stat. § 211B.06. The ALJ explained in his decision that the Complainant failed to put forth any evidence to believe that this statement is false. Instead the Complainant merely explained the circumstances that caused him to vote for hiring the interim Superintendent who had not applied for the job.

In his petition for reconsideration, the Complainant again explains the circumstances of the 2003 search for a superintendent, which, when the two finalists withdrew their names from consideration, ended with the Park Board having no candidates under consideration. The Complainant states that "with the existing

¹ 304 N.W.2d 299 (Minn. 1981) (discussing Minn. Stat. § 210A.04, the predecessor statute to § 211B.06).

² 304 N.W.2d at 300.

superintendent about to leave in a couple of weeks and the holidays approaching, Complainant voted with the majority of the Board to name an Interim Superintendent for one year only while the Board conducted a new search.” The Complainant argues that the Respondent’s failure to insert the word “interim” before the word “Superintendent” in his campaign material was meant to deceive the public into thinking that the current superintendent was put in his job by some clandestine move without ever applying for the job.

Minn. Stat. § 211B.34, Subd. 3, provides that a petition for reconsideration may only be granted if the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made “a clear error of law.” The Chief Administrative Law Judge finds that the ALJ’s decision to dismiss the two allegations at issue was not erroneous as a matter of law. The statement that Complainant “is becoming more like a cheerleader for private interests” is an opinion and is not the type of factual statement that can form the basis of a violation of Minn. Stat. § 211B.06. Moreover, Complainant’s argument regarding the timing of the votes on proposals is not determinative of whether the statement that he is a “cheerleader for private interests” is false. As for the statement that the Complainant voted to hire a Superintendent who never applied for the job, the Complainant has provided further explanation as to why he and the majority of the Board voted to hire the interim Superintendent when the search for a Superintendent failed to result in any candidates; but he has failed to show that any facts in the statement at issue are false. In addition, the Chief Administrative Law Judge is not persuaded that the failure of the Respondent to insert the word “interim” before the word “Superintendent” is sufficient to support a finding of probable cause.

Upon reconsideration, the Chief Administrative Law Judge concludes that the ALJ’s order dismissing the two allegations was not clearly erroneous as a matter of law and that the probable cause order should be affirmed. The petition for reconsideration is denied.

R.R.K.